SOUTHERN UTAH WILDERNESS ALLIANCE
UTAH CHAPTER OF THE SIERRA CLUB

IBLA 92-196 Decided March 5, 1992

Appeal from a decision of the Grand Resource Area Manager, Bureau of Land Management, approving a Record of Decision and Finding of No Significant Impact prepared for application for permit to drill the Chevron 1-20 oil and gas well (EA UT-68-91-080).

Appeal dismissed; case remanded for referral to the Utah State Director.

1. Appeals: Generally--Appeals: Jurisdiction--Board of Land Appeals--Bureau of Land Management--Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Drilling

   A Record of Decision and Finding of No Significant Impact issued by a BLM Area Manager, which is based on an environmental record of review or an environ-mental assessment prepared in response to the filing of an application for permit to drill an oil and gas well under 43 CFR 3162.3-1, is first subject to administrative review by a BLM State Director in accordance with 43 CFR 3165.3(b). An appeal to this Board of such a decision that has not been the subject of State Director review will be dismissed and the case remanded for referral to the appropriate State Director.

APPEARANCES: Scott Groene, Esq., Moab, Utah, for Southern Utah Wilderness Alliance; Christine Osborne, Public Lands Resource Specialist, for Utah Chapter Sierra Club; Charles L. Kaiser, Esq., and Scott W. Hardt, Esq., Denver, Colorado, for Chevron U.S.A. Inc.; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Southern Utah Wilderness Alliance and Utah Chapter of the Sierra Club have appealed the November 27, 1991, Record of Decision and Finding of No Significant Impact issued by the Grand Resource Area Manager, Bureau of Land Management (BLM), in response to Chevron USA Inc.'s application for permit to drill (APD) the Chevron 1-20 oil and gas well (EA UT-68-91-080).

Appellants filed their notice of appeal, dated December 20, 1991, with the Utah State Director, BLM. In a separate letter, also dated December 20, 1991, appellants stated that they had "directed [their] challenge of BLM's approval of this APD to the Interior Board of Land Appeals under 43 CFR 4.21," but that "in order to protect [their] interests as appellants, [they] are also requesting State Director Review [SDR] of this decision pursuant to 43 CFR 3165.3(b)."

By letter dated January 8, 1992, the Acting Deputy State Director, BLM, informed appellants as follows: "Once an action has been appealed to IBLA, jurisdiction is removed from the Bureau. We cannot, therefore act on your request for SDR at this time. We are, however, requesting IBLA to remand this matter to us for review."

On January 17, 1992, counsel for BLM filed with this Board a request that this case be remanded to BLM for SDR in accordance with 43 CFR 3165.3(b) and the Board's decision in Utah Chapter Sierra Club, 114 IBLA 172 (1990).

On January 24, 1992, appellants filed their statement of reasons (SOR) in support of their appeal to this Board. Relying upon Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. __ (1991), they request that this case be considered by the Board, and not remanded to BLM for SDR. In Utah Chapter of the Sierra Club, 121 IBLA at 25, 98 I.D. at __, the Board stated that because the State Director had already conducted a review prior to appeal to the Board, it did "not find it necessary to address whether the State Director review provided for in 43 C.F.R. § 3165.3(b) is mandatory before an appeal may be taken to the Board under 43 C.F.R. § 3165.4(a)."

Appellants argue that SDR is not mandatory. They contend that "the Board's review of the history of the regulations found at §3165.3 and §3165.4 demonstrated that the language used in those regulations was never directed towards appeals of APD approvals" (SOR at 7). They assert, consistent with the Board's ruling in Utah Chapter of the Sierra Club, that "[t]hese regulations serve instead to protect and enhance the appeal rights of operators or lessees faced with orders or decisions which demand compliance with oil and gas law or regulation." Id. at 7-8; see 121 IBLA at 19, 98 I.D. at __. They contend that a decision by BLM's authorized officer approving an APD is not a "'notice of violation or assessment or an instruction, order, or decision,' as those words are used in either §§ 3165.3 or 3165.4." Id. at 7 n.6. Appellants are concerned that if 43 CFR 3165.3(b) is applied to decisions approving APD's, "the delays inherent in the state director review may ensure that the appeal of an APD is made meaningless as work is commenced before the appeal is heard." Id. at 8. Under appellants' interpretation of the regulations, i.e., removing the requirement for SDR of a decision approving an APD, and allowing appellants to appeal directly to this Board, the automatic stay provided for in 43 CFR 4.21(a) is "in effect from the time the decision is issued until an appeal is resolved and the potential ten day window which would be permitted by a state director review period is eliminated." Id. at 10.

For the reasons set forth below, we reject appellants' interpretation of 43 CFR 3165.3(b) and 3165.4(a), and conclude that the decision of the Grand Resource Area Manager relating to the APD for the Chevron 1-20 well must first be reviewed by the State Director before an appeal may be taken to this Board.

The regulatory analysis undertaken in Utah Chapter of the Sierra Club, supra, was directed to determining whether an appeal of an APD decision was covered by the language of 43 CFR 3165.4(c), relating to the effect of an appeal on compliance requirements. The Board concluded therein that 43 CFR 3165.4(c) did not encompass appeals to the Board from decisions approving APD's. The basis for the Board's conclusion was an analysis of that regulation and its predecessors from 1936 to the present. That analysis disclosed that from 1936 to the present that regulation has consistently required that when the agency imposed an affirmative obligation enforcing the oil and gas operating regulations, an appeal did not suspend the obligation to comply, absent a finding by the agency that suspension would not damage the lessor's resources or that adequate bonding would compensate for any damage. Also the Board found that during that time period, language changes to the regulation and preamble explaining such changes gave no indication that the Department intended to include BLM approval of APD's within the coverage of that regulation.

However, as noted, the Board stated in that decision that because "the State Director undertook a review of this case prior to appeal to the Board, * * * we do not find it necessary to address whether the State Director review provided for in 43 C.F.R. § 3165.3(b) is mandatory before an appeal may be taken to the Board under 43 C.F.R. § 3165.4(a)." 121 IBLA at 25, 98 I.D. at __. While that statement could be interpreted as suggesting that the mandatory nature of State Director review of APD decisions is an unresolved issue, it is not.

[1] The regulation providing for State Director review, 43 CFR 3165.3(b), does not have a lengthy regulatory history. As indicated in Utah Chapter of the Sierra Club, 121 IBLA at 10, 98 I.D. at _ , a regulation regarding "technical and procedural review," 30 CFR 221.72, first appeared in the Department's 1982 revision of the onshore oil and gas operation regulations, which at that time were administered by the Minerals Management Service. 47 FR 47758, 47773 (Oct. 27, 1982). With the Secretary's assignment of oversight of oil and gas operations to BLM in 1983, the Department redesignated 30 CFR Part 221 as 43 CFR Part 3160, with 30 CFR 221.72 becoming 43 CFR 3165.3, and providing that the "appropriate BLM State Director" would conduct technical and procedural review. Regulations adopted in 1984 implementing section 109 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719 (1988), retained the technical and procedural review language. 49 FR 37356 (Sept. 21, 1984). In 1987 the regulation was revised and the terminology "technical and procedural review" was abandoned in favor of "administrative review," still to take place before the State Director. 52 FR 5395 (Feb. 20, 1987).

This Board has previously examined this regulatory history and interpreted 43 CFR 3165.3(b) as requiring that SDR is mandatory before an appeal

from an APD decision may be brought to this Board. 1/ Utah Chapter Sierra Club, 114 IBLA 172 (1990); San Juan Citizens Alliance, 104 IBLA 288 (1988).
In Utah Chapter Sierra Club, 114 IBLA at 176, the Board stated:

> In San Juan Citizens Alliance, 104 IBLA 288 (1988), we pointed out that 43 CFR 3165.3 and 3165.4, which used to provide for either a technical and procedural review by the State Director or an appeal to this Board from instructions, orders, or decisions under 43 CFR Part 3160 (see 43 CFR 3165.3, 3165.4 (1986)), were amended effective April 21, 1987, and now provide that an adversely affected party wishing to contest "a notice of violation or assessment or an instruction, order, or decision of the authorized officer issued under the regulations in this part" may first request administrative review by the State Director, see 43 CFR 3165.3(b). See Han-San, Inc., 113 IBLA 361 (1990). If adversely affected by the State Director's decision, the party may then appeal to the Interior Board of Land Appeals, see 43 CFR 3165.4(a).
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> San Juan involved a decision approving an application of a permit to drill rather than, as here, a Record of Decision and FONSI [Finding of No Significant Impact] based on an environmental assessment that was prepared in response to the filing of an APD. Because an environmental record of review or an environmental assessment is a prerequisite to approval of an APD under 43 CFR 3162.5-1(a), however, we believe that a decision based on such an environmental review should, like a decision to approve the APD, first be subject to administrative review by a State Director in accordance with 43 CFR 3165.3(b). See Colorado Environmental Coalition, 108 IBLA 10, 13 (1989). Accordingly, we will treat appellant's notice of appeal as a request for administrative review and remand the matter to the Utah State Director, BLM. San Juan Citizens Alliance, supra.

114 IBLA at 176. 2/

Thus, appellants' arguments to the contrary, an appeal to this Board of an APD decision which has not been the subject of State Director review

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1/ The regulation at 43 CFR 3162.3-1(c) provides that "[t]he operator shall submit to the authorized officer for approval an Application for Permit to Drill for each well." SDR is applicable to, inter alia, a "decision of the authorized officer issued under the regulations of this part." 43 CFR 3165.3(b). An APD decision is a decision issued under 43 CFR Part 3160.
2/ This Board has routinely, by order, remanded cases to BLM for State Director review. See, e.g., Colorado Environmental Coalition, IBLA 91-154 (Order dated Mar. 1, 1991); Powder River Basin Resource Council, IBLA 90-443 (Order dated Aug. 17, 1990).

is properly dismissed by this Board and the case remanded to BLM. 3/ Accordingly, we grant BLM's request that this case be remanded to it for referral to the State Director.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed and the case is remanded to BLM. 4/

Bruce R. Harris
Deputy Chief Administrative Judge

3/ In concluding in Utah Chapter of the Sierra Club, 121 IBLA at 23, 98 I.D. at __, that 43 CFR 3165.4(c) was not applicable to APD decisions the Board distinguished APD approval from a BLM instruction, order, or decision enforcing the requirements of 43 CFR Part 3160 or the terms of a lease, stating that the former was a response to action initiated by a lessee desiring to drill a well and the latter was "designed to carry out the Department's obligations to conserve oil and gas resources and to protect other resources." That distinction is not relevant to the applicability of SDR because the rationale for providing for SDR, which is to afford quick in-house administrative review of lower level management decisionmaking, is equally applicable to APD decisions and BLM enforcement actions. 4/ On Feb. 24, 1992, counsel for Chevron, U.S.A., Inc., filed a "Motion to Dissolve the Automatic Stay and Answer to Statement of Reasons." Given our disposition of this case, it is unnecessary to rule on Chevron's motion.

ADMINISTRATIVE JUDGE BYRNES CONCURRING:

In addition to our previous analysis contained in Utah Chapter Sierra Club, 114 IBLA 172 (1990), and San Juan Citizens Alliance, 104 IBLA 288 (1988), I believe that a fair reading of the plain language of the regulation supports our prior decisions on this subject. Throughout 43 CFR 3165, "Relief, Conflicts, and Appeals," the clear context of any appeal to the Interior Board of Land Appeals (Board) is framed in terms of an appeal from a decision of the State Director of the Bureau of Land Management (BLM).

Therefore, in the pertinent part of 3165.3(b), the regulation states that:

> Any adversely affected party that contests a notice of violation or assessment or an instruction, order, or decision of the authorized officer issued under the regulations in this part, may request an administrative review, before the State Director * * *. Any party who is adversely affected by the State Director's decision may appeal that decision to the Interior Board of Land Appeals as provided in § 3165.4 of this part. [Emphasis added.]

This clear emphasis on an appeal to the Board from a decision of the State Director is restated in 43 CFR 3165.4(a):

> Any party adversely affected by the decision of the State Director after State Director review, under § 3165.3(b) of this title, of a notice of violation or assessment or of an instruction, order, or decision may appeal that decision to the Interior Board of Land Appeals pursuant to the regulations set out in part 4 of this title. [Emphasis added.]

The foregoing language makes it quite apparent that the regulation requires an appeal to the Board be from a decision of the State Director.

Additional support for this view may be inferred from another part of the regulation which demonstrates that where BLM meant to offer an optional scheme of appeal forums it did so in explicit language. Thus, 43 CFR 3165.3(c) states that: "Therefore, any party adversely affected by the State Director's decision on the proposed penalty, may request a hearing on the record before an Administrative Law Judge or, in lieu of a hearing, may appeal that decision to the Interior Board of Land Appeals * * *." [Emphasis added.]

As noted in the lead opinion, appellants make much of the statement contained in Utah Chapter of the Sierra Club, 121 IBLA 1, 25, 98 I.D. ___ (1991), that the Board did "not find it necessary to address whether the State Director review provided for in 43 C.F.R. § 3165.3(b) is mandatory

before an appeal may be taken to the Board under 43 C.F.R. § 3165.4(a)." The Board in that case was suggesting that a closer analysis of that section be conducted. This is particularly appropriate in light of the change of the word "shall" to "may" from the proposed rule to the final rule version of 43 CFR 3165.3(b). (Compare 51 FR 3892 (Jan. 30, 1986), to 52 FR 5395 (Feb. 20, 1987)). As the above analysis shows, however, this change is not significant when read in context with the balance of the regulation.

Thus, it is appropriate to affirm the Board's prior interpretations and remand the instant appeal to BLM.

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James L. Byrnes
Administrative Judge